

IN THE MATTER OF THE)
ARBITRATION BETWEEN)
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FLORIDA POLICE)
BENEVOLENT ASSOCIATION)
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Association,)
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and)
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CITY OF TALLAHASSEE)
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Employer)
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FMCS FILE No. 1910-1 8
GRIEVANCE: Termination
GRIEVANT: DAMIEN PEARSON

FINAL AND BINDING AWARD

ARBITRATOR: DANIEL R. SALING, ESQ

AWARD DATE: May 17, 2019

APPEARANCES

EMPLOYER: Jill B. Kowalski, Esq.
Assistant City Attorney
Office of the City Attorney
300 S. Adams Street
Tallahassee, FL 32301-1731

UNION: WEBSTER & BAPTISTE
Stephen G. Webster, Esq. &
Louis J. Baptiste, Esq.
1615 Village Square Blvd., Suite 5
Tallahassee, FL 32309

WITNESSES:

For the Employer:

Jerritt Federico - Investigator - Internal Affairs Unit – Tallahassee Police Department
James C. Couch - Sergeant - Internal Affairs Unit – Tallahassee Police Department
Tracy Clark - Lieutenant - Field Training - Tallahassee Police Department
Michael DeLeo - Chief - Tallahassee Police Department

For the Union:

James P. Fairfield - Lieutenant - Tallahassee Police Department
Cyrus J. Underwood - Office - Tallahassee Police Department – Firearms Instructor
Damien J. Pearson – Grievant

PROCEDURAL HISTORY

The City of Tallahassee is hereinafter referred to as the “Employer” or the “City.” The Florida Police Benevolent Association is hereinafter referred to as the “Association” or the “PBA.” The Tallahassee Police Department is hereinafter referred to as the

“Department.” Damien J. Pearson is hereinafter referred to as the “Grievant.” The Chief of Police for the City of Tallahassee is Chief Michael DeLeo, and is hereinafter referred to as “Chief DeLeo.” The collective bargaining agreement dated October 1, 2017 through September 30, 2020, is hereinafter referred to as the “Agreement.” (MX 7) The term Proper Cause and Just Cause are synonymous and hereinafter referred to as “Just Cause.”

The Grievant was involved in a shooting incident on March 17, 2017. The City issued a letter to the Grievant on May 30, 2017, informing him that he was under investigation regarding the circumstances surrounding the discharge of a firearm on March 17, 2017. (MX 1-28) On May 30, 2017, Chief DeLeo assigned the Department’s Internal Affairs office, hereinafter referred to as the “IA”, to investigate the Grievant’s actions on March 17, 2017. (MX 1) The Department assigned Investigator Jerritt Federico as the lead investigator, hereinafter referred to as the “IA Investigator.”

After the IA Investigator had completed his investigation, he wrote an investigative report which was reviewed by his supervisor, Sergeant James Couch who signed off on the report. The initial report determined that the Grievant’s use of force on March 17, 2018, was reasonable. The investigative report was reviewed by Chief DeLeo, who questioned the investigator’s decision because the report did not address the issue of “imminent danger.” The IA Investigator rewrote the report and changed his finding to indicate the Grievant had violated General Order 60 and had not used reasonable force. The IA Investigator justified his change in the report based upon him not having initially considered the issue related to “imminent danger.”

On August 2, 2017, following completion of the IA investigation, Chief DeLeo sent the Grievant a memorandum indicating the investigation had determined that the Grievant’s conduct on March 17, 2017, was not in compliance with either the Response to Resistance (General Order 60) or Firearms/Less Firearms policies (General Order 70). (MX 2). Chief DeLeo’s memorandum of August 2, 2017, informed the Grievant that he could be disciplined by either being suspended or terminated for his violation of Department policy. Further, the memorandum informed the Grievant that he could meet

with Chief DeLeo prior to the final determination regarding what level of corrective action would be imposed and that he had the right to union representation. A meeting was scheduled and took place on August 7, 2017, and the Grievant was given the opportunity to present his position of what occurred during the March 17, 2017 incident.

On August 15, 2017, Chief DeLeo sent a memorandum to the Grievant indicating that the Department did not believe the incident on March 17, 2017, imposed an imminent threat to him or the public and the Department had decided to terminate his employment.

The grievance in question, FMCS File No. 1910-18, was submitted to the Department in writing and was thereafter processed in accordance with Article 5 of the Agreement, between the City and the PBA. The parties moved the Grievance to Step 3- Arbitration and using the services of the Federal Mediation and Conciliation Service, Daniel R. Saling was appointed as Arbitrator on October 25. 2018.

On February 18 & 19, 2019, an arbitration hearing was held at the Accurate Stenotype Reporters offices at 2894-A Remington Green Lane, Tallahassee, Florida 32308. During the course of the hearing, all parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. All witnesses were duly sworn.

The parties elected to file post-hearing briefs. The Arbitrator received timely post-hearing briefs from all parties. The last post-hearing brief was received electronically on May 3, 2019. On May 6, 2019, counsel for the City submitted a corrected brief and requested leave to amend the City's early post hearing brief by making needed corrections and the request was granted by the Arbitrator.

The parties stipulated that the grievance and arbitration were timely and properly before the Arbitrator and the Arbitrator had the authority to submit a final and binding decision. Further, the parties agreed that under the terms of the Agreement the party that does not prevail in the hearing would be responsible for the payment of the arbitrator's fees and expenses.

PERTINENT PROVISIONS OF DEPARTMENT RULES:

GENERAL ORDER 60 - RESPONSE TO RESISTANCE:

...

Section I (E):

This written directive is a guide to officers for selecting reasonable and legal Responses to Resistance Options of Control/Force during verbal or physical encounters.

...

Section III (A):

Officers may use deadly force only when they believe it is objectively reasonable to defend their life or the life of another person from an imminent threat of great bodily harm or death.

...

Submission Statement:

The Association and Department were unable to agree to a submission statement. The Association and Department agreed to present their case and to allow the Arbitrator to formulate a submission statement based on the testimony and evidence presented.

The Arbitrator formulated the following submission statement:

1. Was the Grievant terminated for proper cause?
2. If not, what is the appropriate remedy?

FACTUAL BACKGROUND

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Tallahassee is the capital city of the U.S. state of Florida. It is the county seat and the only incorporated municipality in Leon County. The population of Tallahassee metropolitan area in 2018 was 385,245 and is the largest city in the Florida Panhandle region. The City has a duly elected city council and mayor and provides a number of services for its residents, including the services of the Tallahassee Police Department.

The Grievant began work as a sworn officer with the Department in 2014. Prior to becoming a sworn officer, the Grievant served twelve years as a U.S. Marine and had numerous deployments and overseas duty assignments. Following his employment with the Department, the Grievant attended and participated in exhaustive training with the Department on all aspects of police work.

At the time of the alleged incident that gave rise to the Grievant's termination, the Grievant had been a sworn officer with the Department for approximately three years. During his tenure with the Department, the Appellant had good evaluations and no discipline history.

On the shift in question, the Grievant began his shift at 9:15 p.m. on March 16, 2017 and his shift concluded at 7:15 a.m. on March 17, 2017. During the shift in question, one of the Grievant's zone partners was on a call for service at Tallahassee Memorial Hospital and his other zone partner had taken the weekend off, which required the Grievant to work the zone without backup.

At approximately 1:40 a.m. on March 17, 2017, the Grievant contacted the Consolidated Dispatch Agency ("CDA") by radio and advised them of a suspicious vehicle in the parking lot of the Palmer Munroe Teen Center, 1900 Jackson Bluff Road. A short time after making his initial radio contact, he made a second call to CDA. The Grievant informed CDA that the suspicious vehicle had hit his patrol vehicle and that shots had been fired. In his radio transmission with the CDA, the Grievant indicated that the suspicious vehicle had hit his patrol car and that the patrol call had then struck him. The Grievant indicated that the vehicle that had struck his vehicle was a white-colored Chevrolet Impala with two black male occupants.

At 1:46 a.m. Kendrick Crawford, (“Mr. Crawford”) contacted CDA and reported that his 2013, white Chevrolet Impala, registered to his mother, Brenda Williams, has been stolen at a gas station a few minutes prior to the incident at the Palmer Munroe Teen Center.

At 1:48 a.m. Leon County Sheriff’s Officer Austin Whitley spotted the vehicle in question and the black male occupants attempted to conceal their faces with their arms. The Deputy pursued the vehicle and was joined by other Leon County Deputies but after an 11 mile pursuit, the deputies lost sight of the vehicle and the pursuit was terminated.

Police investigators met with Mr. Crawford, who indicated that he had left the vehicle with the keys in the ignition and when he returned, the vehicle had been stolen. The Department’s investigators determined that Mr. Crawford’s statements were false, based on their follow-up investigation and review of the surveillance video at the gas station.

The investigators determined that Mr. Crawford had been at the Palmer Munroe Teen Center with a Ms. St. Hilaire. When Ms. St. Hilaire was interviewed by the investigators, she indicated that she had heard gun shots and had observed the white Chevrolet Impala quickly leave the parking lot. Through their follow up investigation the Police investigator established that Jontavian Riley (“Mr. Riley”) and Byron Wimberly (“Mr. Wimberly”), both seventeen-year-olds, were the occupants in the vehicle at the time of the crash and when the shooting had occurred.

On June 11, 2018, Mr. Crawford was arrested for “Making a False Report – Knowingly Giving False Information to Law Enforcement” and “Misuse of 911.” On June 12, 2018, Mr. Wimberly was arrested for “Aggravated Battery on a Law Enforcement Officer.”

The Department terminated the Grievant because it believed that the March 17, 2017, accident was a serious violation of Department policy. The Department believes, based on the totality of the evidence, it was not objectively reasonable for the Grievant to have believed that there was an imminent threat of great bodily harm or death at the time he fired his weapon.

DEPARTMENT’S POSITION

The Department believes that it has shown by the preponderance of the evidence that on March 17, 2017, the Grievant was involved in a shooting incident in violation of the

Department's General Rules 60. (MX 5) The Department contends that it was not objectively reasonable for the Grievant to have believed that he was an imminent threat of great bodily harm or death at the time he fired his weapon. The Department believes that the shooting was an excessive use of force and that the termination of the Grievant was justified by the totality of the circumstances surrounding the incident.

The Grievant drove into the parking lot at the Palmer Munroe Teen Center because he had observed a suspicious vehicle parked in front of the Center in a handicapped parking spot. The Grievant parked at an angle behind the suspicious vehicle and got out of his patrol car to investigate. As he stood by his vehicle, the suspicious vehicle was placed in reverse and struck the Grievant's patrol vehicle and then his patrol vehicle struck him. The suspicious vehicle drove forward and once the Grievant had acquired his footing, he pulled his firearm and began to run after the vehicle. The Grievant fired six shots into the side and back quarter panel on the driver's side of the vehicle.

The Department contends that the Grievant may have been in imminent threat of great bodily harm when he was struck by his vehicle but the Grievant did not commence to run after the fleeing vehicle and discharge his weapon until the vehicle was beginning to drive out of the parking lot. Once the vehicle began to drive away from the Grievant, he was no longer in imminent threat for his safety and therefore should not have discharged his weapon. The Grievant testified that at the time of the incident, his brain was telling him to seek cover, which is contradictory to his actions of running after the fleeing vehicle.

The Department's investigation into the March 17, 2017, incident concluded that the Grievant's actions were not in compliance with General Order 60, Response to Resistance (MX 5) but was in compliance with General Order 70, Firearms/Less Lethal Firearms. (LX 14)

Lieutenant Tracy Clark, ("Lt. Clark"), testified that in the Department's Interactive Use of Force Lesson Plan (MX 4), which is used to train sworn officers in the use of deadly force clearly informs officers that when an imminent threat is no longer present, the

officer is not allowed to continue to use deadly force. The Department conditions officers so they will not get stuck in an “OODA” loop, this acronym stands for observe, orient, decide and act. If an officer does not follow this procedure, they develop tunnel vision and this can lead them to see only what is in front of them and does not allow them to process other external factors. The Department believes the Grievant had tunnel vision during the incident of March 17, 2017, and was not able to stop firing his firearm after the vehicle was no longer an imminent danger to him or others.

The Department questioned the testimony of Lieutenant James Fairfield, (“Lt. Fairfield”), who attempted to explain the Grievant’s conduct based upon “force science.” The Department does not believe that “force science” is an established science and does not believe that Lt. Fairfield, can be considered an expert in the field.

The Association presented two other cases where officers were involved in shooting incidents but were found not to have violated Department policy. The Department contends that the Grievant had not seen any of the videos of the police shooting prior to his shooting on March 17, 2017. The Department believes that the other shooting incidents are easily distinguishable because the officers feared for their safety, whereas the Grievant was not in treat of imminent danger.

The Department believes that it has applied the Graham v. Connor, 109 S. Ct. 1865 (1989) case factors correctly. The Department found that the Grievant’s actions were not “objectively reasonable” in light of the facts and circumstances confronting him. The Department carefully looked at all the facts and circumstances in the Grievant’s case and found that the Grievant’s conduct was not objectively reasonable.

The Department has met its burden of proof. The Department has shown by the preponderance of the evidence that the Grievant’s conduct has violated long established Department rules regarding the use of unnecessary force and/or excessive force and the Grievant understood that violation of these rules could subject him to an appropriate level of discipline.

The Department contends that it has terminated the Grievant for just or proper cause.

The Grievant was aware of the Department's rules, had received training and had acknowledged his awareness of the rules. Further, the evidence clearly showed that the Grievant's actions on the morning of March 17, 2017, violated these Department policies. The Department fully investigated the March 17, 2017, incident and issued discipline that was commensurate with the seriousness of the Grievant's misconduct.

While the Association may argue that the Department was obligated to follow progressive discipline, this argument must fail. While progressive discipline is to be used to rehabilitate an employee, some employee offenses are so serious as to warrant termination for a first offense violation. The use of deadly force is a very serious concern for any police department and when an officer uses excessive force, the only appropriate discipline is termination.

The Department requests that the Arbitrator find that the Grievant's termination was appropriate and that it was based on just cause.

ASSOCIATION'S POSITION

The Association contends that the primary issue that must be addressed is whether or not the Grievant believes it was objectively reasonable to use deadly force to defend his life or the life of another person from an imminent threat of great bodily harm or death. The Association does not believe that the Department had just cause to terminate him for the alleged violation of General Order 60.

The Association contends that the just cause standards must be followed by the Department when disciplining an employee. Just cause includes a determination that sufficient evidence exists to substantiate the allegations as set forth in the notice of discipline and, if that determination is reached, it also includes a determination that the penalty imposed is just and appropriate. The City must prove its accusation by the preponderance of the evidence and also has the burden to prove that the discipline administered was appropriate.

For the Department to establish whether a police officer's use of force is appropriate or

excessive, it requires a careful consideration of the “nature and quality of the intrusion of the [suspects] Fourth Amendment interest against the countervailing governmental interest at stake.” *Graham (supra)* The U.S. Supreme Court in *Graham (supra)* established that “reasonableness” is not amenable to a precise definition or mechanical application. Reasonableness can only be determined by examining the totality of the circumstances and cannot be determined upon perfect clarity of hindsight. When the Department is analyzing a use of force incident for reasonableness, it must review the matter from the perspective of a reasonable officer and must include a recognition that officers are often required to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving when determining the amount of force that is necessary in a particular situation.

In evaluating just cause, labor arbitrators have long relied upon the seven tests of just cause that was introduced by Professor Carol Daugherty in 1966. The seven factors are:

1. The employee knew of the company’s policy.
2. The company’s policy was reasonable.
3. The company investigated to determine that the employee violated the policy.
4. The investigation was fair and objective.
5. Substantial evidence existed of the employee’s violation of the policy.
6. The company’s policy was consistently applied.
7. The discipline was reasonable and proportional (the punishment fit the crime).

The Association contends that the Department failed to prove that the Grievant had an understood General Order 60 as it was applied by the Department in his case. Even the IA Investigator in his initial investigative report did not understand the rule as interpreted and applied by Chief DeLeo. Based on the testimony of the IA Investigator, Lieutenant Fairfield (LT. Fairfield) and Officer Underwood, the Grievance conduct on March 17, 2017, was in compliance with Department General Order 60. The Association believes that Chief DeLeo’s interpretation of General Order 60 is novel and is inconsistent with the common understanding of its strictures. Furthermore, the testimony of officers charged with training other officers, clearly established that the training given to officers

with regard to use of force is inconsistent with General Order 60 as it has been interpreted and applied by Chief DeLeo.

The Department's application of General Order 60 is unreasonable and places officers in the field in a position of not knowing when they have the right to use any level of force. The Department's interpretation of General Order 60 requires officers to act contrary to their natural instincts and training. In the early hours of March 17, 2017, the Grievant was working alone and without backup, when he approached a suspicious vehicle in a parking lot in front of a City building that was not open. The Grievant pulled up behind the suspicious vehicle and stepped out of his marked patrol vehicle, when the suspicious vehicle quickly backed into the Grievant's patrol vehicle and his vehicle then hit him and caused injuries that he was later treated for and then released.

General Order 60 contains an admonishment that officers are strongly discouraged from discharging a firearm from a moving vehicle or at a moving vehicle. The IA Investigator testified that the language of General Order 60 does not absolutely prohibit but "strongly discourages" the discharging of a firearm from a moving vehicle or at a moving vehicle. The IA Investigator testified that he knew of two separate shooting incidents where officers had fired into a moving vehicle and they were not disciplined.

The IA Investigator testified that he had incorporated several of the *Graham* (*supra*) factors in his initial investigative report. The IA Investigator further testified that he originally concluded that the Grievant did face an "immediate" threat and that this finding supported his original finding that the Grievant had not violated the provisions of General Order 60. Additionally, the IA Investigator cited the following Graham factors in support of his original finding: (1) the Grievant's use of force was in response to a violent felony offense, (2) the level of resistance was sufficiently violent to warrant the use of deadly force, (3) the Grievant was alone, (4) the Grievant was forced to make a split-second decision to use deadly force, (5) the suspects' proximity to weapons, and (5) the Grievant's perceptions at the time the decision to used force was made.

The IA Investigator testified that his original report contained findings and not opinions.

The IA Investigator agreed that the Grievant was justified in using deadly force for approximately three (3) seconds prior to the time that the Grievant discharged his firearm for the first time. Additionally, the report indicated that the Grievant had not fired any shots into the rear or back of the suspicious vehicle and that all of the rounds had been fired into the driver's side of the suspicious vehicle.

The Grievant discharged his firearm due to his perception that the suspects posed a great risk of bodily harm and/or death. The suspects sitting in the suspicious vehicle used the vehicle as a deadly weapon against the Grievant and subsequently led Leon County Sheriff deputies on an 11 mile pursuit but were able to escape the pursuit. The investigative report stated that the passenger in the suspicious vehicle admitted that both he and the driver knew that the vehicle that had pulled up behind them was a marked patrol vehicle prior to ramming into the patrol vehicle.

The IA Investigator testified that a time span of approximately ten (10) seconds occurred from the time the Grievant arrived at the scene until the suspects left the scene. Within the ten (10) second time period the Grievant arrived at the scene of the incident, got out of his patrol vehicle, his patrol vehicle was rammed by the suspect's vehicle, the Grievant's patrol vehicle hit him and knocked him off balance, he recovered his balance, realized he was in imminent danger, drew his fire arm, began running toward the suspect's vehicle and discharged his weapon into the side of the suspect's vehicle.

The Union does believe that the Department's internal investigation was fair and objective. The initial IA Investigative report found that the Grievant's discharging of his firearm was within Department policy. It was only after Chief DeLeo became involved in the post investigative report did the IA Investigator find that the Grievant's conduct on the morning of March 17, 2017 was not within Department guidelines as outlined in General Order 60. The Association contends that the IA Investigator's decision to change his conclusion in his original investigative report was reached at the behest of Chief DeLeo and was not the product of an objective investigation. The Department ignored the holding of *Graham (supra)* and failed to understand the significance of an "imminent threat." Therefore, the second finding of the IA Investigator's report was biased and was

not consistent with the objective findings reported in the initial investigative report.

The numerous conflicting opinions and conflicting investigative findings rebuts a conclusion that substantial evidence supports the determination that the Grievant violated General Order 60. The Department has failed to meet its burden of proof and the evidence and testimony presented by the Department has not established by the preponderance of the evidence that the Grievant violated General Order 60.

The Association provided a number of cases where officers had shot at a moving vehicle and were not disciplined for having violated General Order 60. The IA Investigator testified that approximately two months prior to the Grievant's March 17, 2017, incident, two officers, Investigator Campbell and Officer Reeder, were involved in a shooting incident with a fleeing vehicle. (LX 1) Investigator Campbell had been struck by the vehicle and both he and Officer Reed discharged their firearms at the vehicle as it fled away from the scene. The two officers discharged fourteen rounds into the back of the fleeing vehicle. The Department applied the same version of General Order 60 on this case as it had in the Grievant's case but found that Campbell and Reeder had not violated Department policy when shooting at a fleeing suspect's vehicle.

In 2013 Officer Schulze fired into the truck of a fleeing suspect's vehicle but did not receive any form of discipline. In Officer Schulze's case, Chief DeLeo reviewed and approved that his use of force was reasonable. The Association contends that other officers have shot into the back of fleeing suspect's vehicle and yet their actions were not disciplined even though the vehicle was moving away from the officers and that they were no longer were in "imminent" threat of great bodily harm or death. Yet, in the Grievant's case, Chief DeLeo subjectively determined that the Grievant should not have considered himself in imminent threat of great bodily harm or death – even though in a (10) ten second time frame and in the heat of the moment, the Grievant was struck by his patrol car. The Department's decision that the Grievant's decision to use deadly force was not objectively reasonable for him because he was not in imminent danger of being harmed or being killed is not supported by the evidence. The conduct of the Department shows that it has taken action that can only be considered to be disparate treatment when

compared to the discipline of other officers charged with the same alleged conduct that resulted in the Grievant's termination. The Department has not treated employees who have allegedly committed the same alleged act similarly.

Even if the Grievant's conduct justified discipline, Chief DeLeo admitted that he did not give any weight to the Grievant's stellar service with the Department. Further, the Department did not follow progressive discipline. Even if the Grievant was found to be out of compliance with General Order 60, termination was an unjust form of punishment.

The Association believes that the Department has failed to prove that just cause existed for the discipline in this matter. The preponderance of the evidence does not support the finding that the Grievant violated General Order 60. The Grievant's use of deadly force was justified and lawful. The Association requests that the Arbitrator sustain the grievance and provide an award which includes immediate reinstatement with full back pay, restoration of seniority and benefits.

DISCUSSION

The facts of this case are clear and unambiguous. On March 17, 2017, the Grievant was checking on a suspicious vehicle in a parking lot in front of a city owned building. When the Grievant got out of his marked patrol vehicle to speak with the occupant in the suspicious vehicle, the suspicious vehicle was placed in reverse and struck the Grievant's patrol vehicle, which then stuck the Grievant. The Grievant was without backup in a deserted parking lot and he drew his firearm and fired six shots into the driver side of the suspect's vehicle.

The Department investigated the shooting incident and initially determined that the Grievant had discharged his firearm within the provisions of General Order 60. Later, Chief DeLeo spoke with the IA Investigator and indicated that he did not believe the Grievant was in "imminent" threat of great bodily harm or death. Therefore, it was not objectively reasonable for him to use deadly force to defend his life or the life of another person from an imminent threat of great bodily harm or death.

The Grievant was terminated for violation of General Order 60. The Grievant filed a grievance and has requested reinstatement based on the provisions of the *Graham (supra)* holdings and the violation of the Grievant rights under just cause.

“Just cause” consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Other elements include a requirement that an employee know or be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge; that there is the existence of a reasonable relationship between an employee’s misconduct and the punishment imposed; that a fair and objective investigation was conducted; and that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

The Grievant had been employed as a sworn officer with the Department for approximately three (3) years, as of the date of the incident on March 17, 2017, the evidence established that the Grievant was aware of the Department’s General Order 60, with regard to the use of deadly force. The Grievant had received training on General Order 60 and was aware that violations of the established rule could result in discipline up to and including termination. The Department has the right to develop and implement reasonable policies that provide for a smooth and effective operation of the Department and therefore had the right to establish General Order 60.

The key issue in this case is whether or not the Grievant’s conduct in the early morning of March 17, 2017, was in fact a violation of General Order 60. General Rule provides that, “Officers may use deadly force only when they believe it is objectively reasonable to defend their life or the life of another person from an imminent threat of great bodily harm or death.” (Emphasis added) General Order 60 follows the mandates found in the *Graham (supra)* case. Further, General Order 60 states that it is a “guide to officers” for selecting reasonable and legal Reponses to Resistance Options of Control/Force during verbal or physical encounters and is not a mandated set of rules that must be followed.

(Emphasis added)

One of the elements of just cause is that there must be a fair and objective investigation conducted to determine if allegations filed against an employee are in fact true. In this case the IA Investigator began his investigation on May 30, 2018, by collecting evidence, reviewing relevant documents and conducting interviews. Once the investigation was completed a report was signed by the IA Investigator that determined that the Grievant's use of force was justified and was in compliance with General Order 60. The investigative report was sent to Chief DeLeo for his review and signature. Instead of concurring with the investigative report, Chief DeLeo met with the IA Investigator and informed him that he did not believe that after the time the Grievant and his patrol vehicle were stuck by the suspect's vehicle, the Grievant was in imminent danger and therefore the shooting was not in compliance with General Order 60. After the meeting with Chief DeLeo, the IA Investigator changed his findings to state that the Grievant was not in imminent danger and therefore was not in compliance with General Order 60. It appears that Chief DeLeo was not pleased with the IA Investigator's finding and directed that the findings be change.

There was evidence presented by the Grievant that established that other employees had been involved in discharging their firearms at a suspect's vehicle that was driving away from the scene of an incident but these individuals had not received any form of discipline. Chief DeLeo stated in his testimony that once the vehicle had pulled away from the Grievant that he was no longer in imminent danger and therefore any discharge of his firearm thereafter was a violation of General Order 60. Yet, the two cases presented by the Association clearly established that the suspect's vehicle in those incidents were departing the scene of the incident and they continued to fire into the back of the vehicle. Why were these individuals not found to have violated General Order 60, because under Chief DeLeo's interpretation of General Order 60, once the vehicle moves away from the scene of the incident the officers are no longer in "imminent" danger of being physically harmed or killed and should not have fired at the vehicle. The Department has treated similar incidents substantially differently and has excused the

conduct of a number of officer but has determined that the Grievant must be terminated for the same conduct.

Unless otherwise provided for in the Collective Bargaining Agreement, discipline for all but the most serious offenses must be imposed in gradually increasing levels. This incremental dispensing of discipline is most often referred to as “Progressive Discipline.” The primary objective of discipline is to correct rather than punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge. Yet, some offenses are sufficiently serious to justify serious discipline for a first offense. These include theft, physical attacks, willful and serious safety breaches, gross insubordination, and significant violations of law on the employer’s time or premises.

The Grievant contends that the Department has not established by the preponderance of the evidence that the incident of March 17, 2017, was a violation of General Order 60. The Grievant contends that he reasonably believed that he was in imminent danger and that he was justified in the discharging of his firearm. Therefore, he should not have been terminated. Even if there was a finding that the Grievant had violated General Order 60, the Grievant believes his stellar service to the Department and absent of any discipline history should have been considered mitigating factors. Further, because of the fact that other officers have been investigated for having discharged their weapon at a fleeing vehicle without the consequence of termination, the Grievant believes that he should not have been terminated but given a lessor form of discipline.

Arbitrators may not substitute their judgement for that of an employer with regard to the appropriateness of a penalty, when the misconduct of an employee has been established. Yet, if an arbitrator finds that the employer has engaged in issuing discipline that is excessive, unreasonable or that management has abused its discretion, the arbitrator may exercise his judgment as to the appropriateness of the proposed discipline.

CONCLUSION

The Department must administer discipline to an employee by following certain prescribed rules, regulations and procedures. The Department must establish that it had a rational and legal basis for the administration of discipline against an employee. In the furtherance of the goal of improving employee performance and taking appropriate disciplinary action, the Department is obligated to use "just cause" in the administration of discipline of an employee.

The Supreme Court cautioned that in examining excessive force claims that "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham (supra)* The Court also stated that the use of force should be measured by what the officer knew at the scene, not by the "20/20 vision of hindsight" by a Monday-morning quarterback. In sum, the Court fashioned a realistically generous test for use of force lawsuits.

In the nearly three decade history of *Graham (supra)*, courts have refined the three-prong *Graham* test and applied a number of additional factors. For example, courts consider the degree of threat posed by the suspect to officers or the public in light of relative numbers and strength. When officers are outnumbered or confronted with particularly powerful suspects, additional force may be justified. *Sharrar v. Felsing*, 128 F.3d 810 (3rd Cir. 1997). Courts may also consider the immediate availability of less-lethal tools. *Tom v. Voids*, 963 F.2d 952 (7th Cir. 1992). The suspect's history of mental illness, or level of impairment from alcohol or drugs, also contributes to the analysis of the threat posed by the suspect. *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir.), *cert. denied*, 510 U.S. 946 (1993).

The facts of this case are clear and unambiguous. In the early morning of March 17, 2017, the Grievant without backup, saw a suspicious vehicle parked in front of the City owned Palmer Munroe Teen Center. The suspicious vehicle was parked in a handicapped

parking spot in front of the closed city owned building. The Grievant drove up behind the vehicle and got out of his patrol vehicle to check on the occupants of the vehicle. As the Grievant moved toward the front of his vehicle the suspicious vehicle immediately backed into the patrol vehicle and the patrol vehicle then struck the Grievant causing him physical harm. The Grievant was thrown off balance and had to regain his balance. Once the Grievant recovered from being struck by his patrol vehicle he unholstered his firearm and began to run after the vehicle. The Grievant discharged his firearm and six shots struck the vehicle on the driver side but no shots were fired into the back or trunk of the vehicle.

The occupants in the suspicious vehicle were aware that the vehicle parked behind them was a marked patrol vehicle, yet they intentionally decided to place their vehicle in reverse and willfully and maliciously crashed into the patrol vehicle. The suspect's vehicle was a dangerous offensive object that could have seriously injured or killed the Grievant. The Grievant found himself in "imminent" danger of being physically harmed or killed and took action as provided for in General Order 60. The Court in *Graham* (*supra*) established that the uses of deadly force standard is whether the use of force is reasonable and the use of force must be measured by what the officer knew at the scene, not by the "20/20 vision of hindsight" by a Monday-morning quarterback. The evidence and testimony established that the initial finding of the IA Investigator was that the Grievant had not used unreasonable force but it was only after Chief DeLeo had reviewed the case did the IA Investigator decide to change his finding and find that the Grievant had not used reasonable force. This is a prime example of what the Court in *Graham* (*supra*) stated was the "20/20 vision of hindsight" by a Monday-morning quarterback.

On March 17, 2017, the Grievant was confronted with two suspects that were willing to use their vehicle as a weapon against a sworn officer. The two suspects knew the vehicle behind them was a marked patrol vehicle but decided to assault the lone officer, without regards for the officer's safety. The entire time span from when the Grievant arrived at the scene of the incident and when the last shot was fired was approximately ten seconds. Assuming that the Grievant exited his vehicle and was then struck by the suspect's vehicle, there would have been a lapse of two or three seconds of time. When the

Grievant was stuck and knocked off balance the time lapsed for him to recover would have been approximately one to two seconds. After having recovered his balance, the Grievant, then had to unholster his firearm and this would have taken approximately two to three seconds. Then the Grievant would have fired his weapon over a three or four second period of time. From the time the Grievant determined that the suspect's vehicle was leaving the parking lot and until his brain sent the message to his muscles to stop shooting, there would have been a two to three seconds time lag.

The timeframe clearly established that the Grievant objectively and reasonably believed that he was in imminent danger of great bodily harm or death. When the vehicle did not make a U-turn and attempt to further harm the Grievant but departed the parking lot, the Grievant realized he was no longer in imminent danger and immediately stopped discharging his firearm. The evidence and testimony clearly established that the Grievant was in compliance with General Order 60 throughout the timeframe of the incident.

The Department's contention that the Grievant was only in imminent danger for the three seconds it took for the suspect's vehicle to strike the marked patrol vehicle is unreasonable and not supported by credible evidence. It was objectively reasonable for the Grievant to believe he was in imminent danger of being injured or killed. The video shows that once the suspect's vehicle had crashed into the patrol vehicle, the vehicle began to move in a forward direction and its left front wheel was turned left. It was objectively reasonable for the Grievant to be concerned that the vehicle might make a U-turn and attempt to hit him.

The Department's contention that the suspects did not have any weapons in the vehicle when the suspect's vehicle was searched does not establish that the suspects did not have weapons at the time they struck the Grievant's patrol vehicle. The suspects were pursued by the Leon County Sheriff's Department for approximately eleven (11) miles and it is very possible that any weapons or contraband that the suspects may have had could have been disposed of by the suspects during the pursuit or after the pursuit was ended. The Grievant was alone and without backup when he was battered and it was reasonably objective for the Grievant to believe that the suspects that were willing to assault a police

could have had weapons in the vehicle.

The Department contends that the Grievant had testified that at the time of the incident his brain was telling him to seek cover, which was contradictory to his actions of running after the fleeing vehicle. The Department gave no consideration to the fact that the Department trains its officers to discharge their firearms while running toward an object. Further, the Department did not give any consideration to the Grievant's 12 years of military training that conditions U.S. Marines to aggressively move toward an object. Certainly, the Grievant may have felt that he should take cover but his training, conditioning and experience had him evaluate the fight or flight options and he choose the fight option.

In evaluating the testimony and the evidence submitted in this hearing, I find that the Grievant was not terminated for just cause. The testimony established that the Grievant did not violate General Order 60, because he reasonably and objectively determined that he was in imminent danger of great bodily harm or death.

The investigation by the IA Investigator was completed and there was a decision that the Grievant's conduct on the date of the incident, was within the provision of General Order 60, but the decision was changed when Chief DeLeo met with the IA Investigator and indicated that he subjectively did not believe the Grievant was in imminent danger. Chief DeLeo subjective evaluation of the incident is not supported by an objective analysis of the facts surrounding the incident.

The evidence that was presented clearly established that other officers have been investigated for shooting at a fleeing vehicle but none of them have been terminated or disciplined. Just cause requires that an employer administer discipline even handedly. The evidence shows the Grievance discharge constitutes disparate treatment. The essence of disparate treatment is differently disciplining similarly situated employees. The facts of the Grievant's case, when compared to the other shooting incident case, is substantially similar but only the Grievant was singled out for termination. While the Association attempted to establish that the Department's decision to terminate the

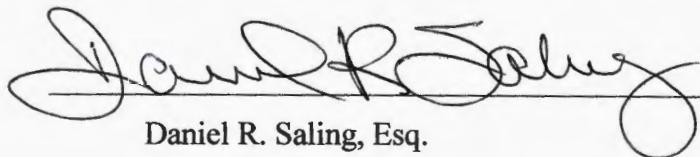
Grievant was based on racial discrimination, the testimony and evidence did not establish that the decision to terminate was racially motivated.

Based upon the testimony and the evidence presented during the hearing, I believe that the Grievant did not violate General Order 60. Further, the Grievant was not terminated for just cause. The Department's conclusion that the Grievant did not have an objectively reasonable belief that he was in imminent danger is not supported by the evidence. Additionally, the Department did not follow the provision of *Graham (supra)*, in reaching its decision to terminate the Grievant.

BINDING AWARD

For the reasons hereto stated, I, Daniel R. Saling, the duly appointed impartial Arbitrator in this matter, issue the following final and binding decision:

1. The Grievance is sustained.
2. The Grievant is to be returned to work and made whole.
3. The City having not prevailed in the hearing shall be responsible for the arbitrator's fees and expenses.



Daniel R. Saling, Esq.

Arbitrator

May 17, 2019

Date